FILED
JAN 10 1993
OFFICE OF THE CLERK

No. 92-1201

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ARMSTRONG WORLD INDUSTRIES, INC.,

Petitioner,

v.

THE INDUSTRY NETWORK SYSTEM, INC. AND ELLIOT FINEMAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF OF PETITIONER

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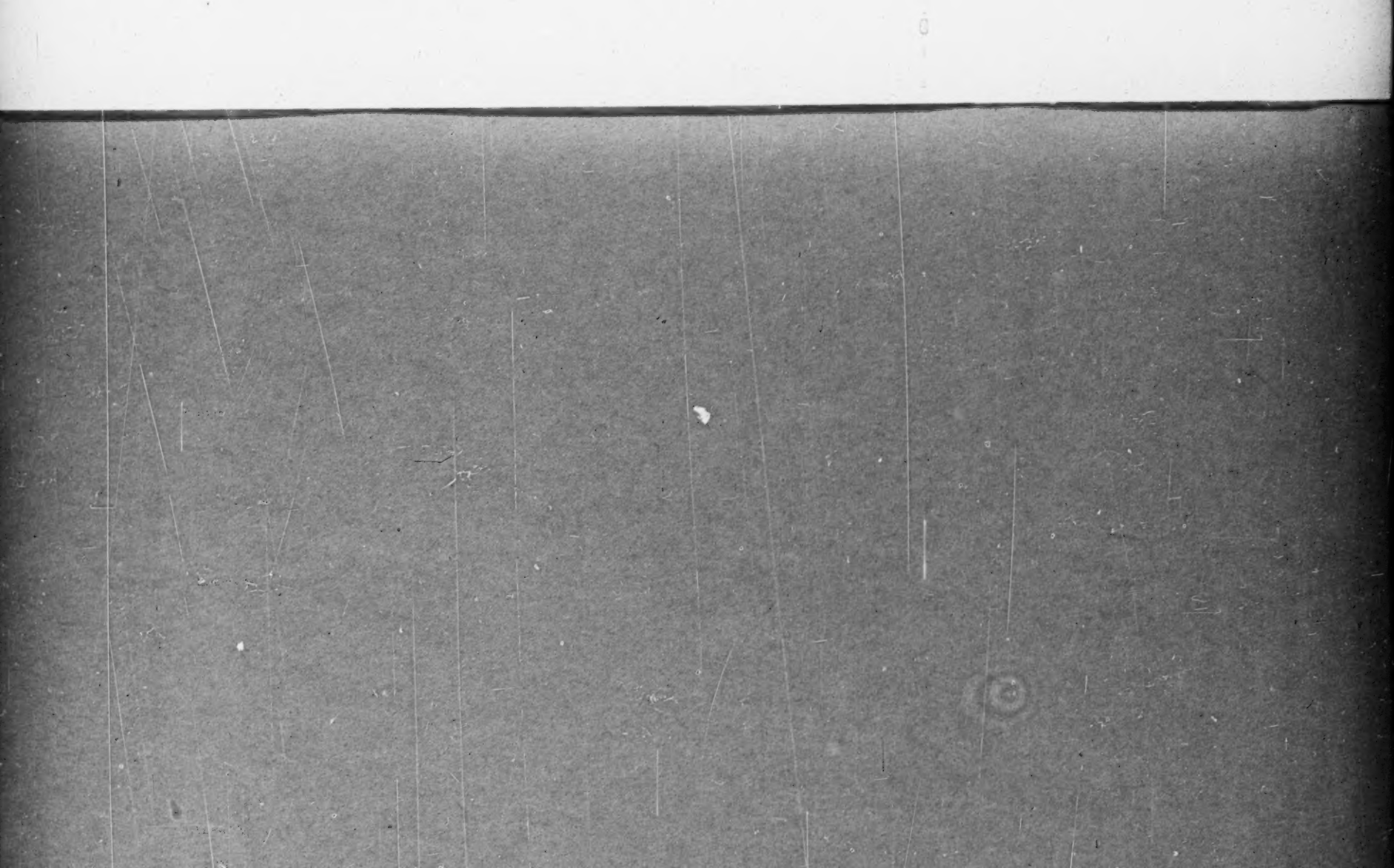

RULE 29.1 STATEMENT

Pursuant to Rule 29.1, Petitioner Armstrong World Industries, Inc. has no parent company and no subsidiaries other than wholly-owned subsidiaries.

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ARGUMENT

Respondents (hereafter "TINS") argue that this is a "fact-intensive" case in which petitioner (hereafter "Armstrong") has advanced "chiefly a sufficiency-of-the-evidence" argument.[1] But Armstrong does not ask the Court to rule on the sufficiency of the evidence. Instead, it requests the Court to accept the evidentiary facts deemed material by the Third Circuit in its analysis of TINS' Section 1 Sherman Act claim and to grant the petition because the Third Circuit's ruling is in sharp conflict with controlling decisions of this Court as well as those of other circuits.

TINS further asserts that inasmuch as this case also involves claims under New Jersey's law, "any decision by this Court would likely be irrelevant" to further proceedings. Opp.1. This assertion ignores the settled law that federal Sherman Act precedents guide the application of New Jersey's antitrust law[2] and tortious interference standards.[3] In any

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[1] Brief in Opposition at 1. Hereafter, citations to TINS' brief will be identified as "Opp.___;" citations to the Petition for Certiorari will be identified as "Pet.___."

[2] *See Desai* v. *St. Barnabas Medical Center*, 103 N.J. 79, 97, 510 A.2d 662, 671 (1986) ("Federal interpretations of the Sherman Act inform our evaluation of this claim."); *New Jersey* v. *Lawn King, Inc.*, 84 N.J. 179, 192, 417 A.2d 1025, 1032 (1980) (same).

[3] New Jersey's tortious interference standards are "substantially similar" to those in the Restatement (Second) of Torts (1979). *Printing Mart-Morristown* v. *Sharp Elecs. Corp.*, 116 N.J. 739, 752, 563 A.2d 31, 37 (1989). For a claim based on tortious interference with a terminable-at-will arrangement such as the Letter of Intent in this case, Section 768 of the Restatement explicitly recognizes "competition as proper . . . interference" if the defendant does not employ either (i) an "unlawful restraint of trade," which refers to "Federal legislation and statutes in many states [which] prohibit inducement not to deal with competitors [if the refusal to deal] . . . unreasonably restrain[s] competition," *id.*, comment *f*, or (ii) "wrongful means," which refers to such conduct as "physical violence" or "criminal" activities not present here. *Id.*, comment *e*.

event, this Court has not hesitated to reverse summarily an antitrust ruling that clearly ignores the Court's precedents even though additional issues may remain on remand. *See Palmer* v. *BRG, Inc.*, 111 S. Ct. 401, 403 n.7 (1990).

TINS' third argument — that review by this Court would be "premature" (Opp. 1) because the Third Circuit ordered a second trial — is contrary to numerous precedents, including *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), in which this Court granted certiorari and reversed a remand decision of the Third Circuit. Certiorari is appropriate where, as here, there is need for guidance because a court of appeals has decided an important question of federal law in a way that conflicts with applicable decisions of this Court or decisions of other circuits. S. Ct. Rule 10. The need for such guidance, evident in *Matsushita*, is even more pressing here. Unlike the "daunting[ly]" fact-intensive international conspiracy in *Matsushita*, 475 U.S. at 576, the crux of this case is one oral statement made in a manufacturer's routine sales effort with a distributor; such business conduct recurs countless times each day, but under the Third Circuit's reasoning, it could generate extensive antitrust litigation across the entire commercial landscape.

1. **The Vertical Conspiracy Question**. TINS' most egregious misstatement is the assertion that the Third Circuit's conspiracy analysis "discussed . . . at length and undeniably applied" (Opp. 6) the limitations on reasonable inferences, as imposed by antitrust law under *Monsanto* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984) and *Matsushita*. Those two cases were mentioned only in the context of the Third Circuit's *tort analysis* (26A), which rejected Armstrong's argument urging the court to recognize the "heightened standard of proof" — required by *Monsanto* and *Matsushita* in assessing TINS' antitrust claims — as also being appropriate for TINS' tort claims in which lawful competition is a crucial factor. The Third Circuit assumed "that antitrust law requires such a standard" but was "not persuaded that it [the

standard] should apply to a New Jersey tortious interference claim." 27A. Thus, the Third Circuit "reject[ed] Armstrong's assertion that 'it would be illogical to apply differing legal rules on permissible interference for antitrust and tort claims where, as here, the *very same conduct* is challenged as both tortious interference and an antitrust violation.'" 28A (emphasis in quoted brief).

In the Third Circuit's subsequent conspiracy analysis (77A-84A), *Monsanto* and *Matsushita* were never even mentioned. To the contrary, the Third Circuit acknowledged, in a footnote, which ironically is quoted and stressed by TINS (Opp. 7), that the court's analysis of "reasonable inferences" for the antitrust conspiracy claim was based on the very *same analysis* in assessing the tort claims: "[F]or the reasons provided in Part III [on the tort claim] we reject Armstrong's formulation of the reasonable inferences that may be garnered from the trial record." 79A n.30.

The Third Circuit's sharp and unexplained departure from *Monsanto* and *Matsushita* could not be clearer: It expressly disavowed the rule of those antitrust precedents in formulating "reasonable inferences" relating to TINS' tort claim; then, in its antitrust conspiracy analysis, the Third Circuit expressly relied upon its tort analysis of "reasonable inferences" to reject Armstrong's arguments that *Monsanto* and *Matsushita* do not permit such inferences for a Sherman Act vertical conspiracy claim.

Despite the intemperate tone of the Brief in Opposition, the central point encompassed in the vertical conspiracy question stands unrebutted. The *only* purported wrongful conduct of Armstrong identified in the Third Circuit's conspiracy analysis (81A-82A) was the single comment by Armstrong's local sales manager (Roth) to Stern's president (Abrahamson), *i.e.*, that it "does not make a lot of sense" for Stern to distribute TINS' videos because Roth perceived them to "overlap" with Armstrong's videos. The district court,

after hearing all the evidence, correctly concluded that "the statement is not itself a threat, does not suggest a threat, and did not take place in a context suggesting a threat." 134A.[4]

The Third Circuit reached the opposite conclusion based on an attenuated chain of inferences in which Roth's statement was the crucial factor. 42A-43A; 81A-82A. But contrary to TINS' contention, the Third Circuit's conspiracy analysis does *not* identify any other alleged wrongdoing by Armstrong. The "other evidence" cited by TINS (but not in the Third Circuit's conspiracy analysis) consists of (i) a 1983 dispute between Armstrong and TINS, which was settled well before any events related to Stern;[5] (ii) an internal Armstrong memo (referring to "assistance"), of which Stern had no knowledge;[6] (iii) mischaracterizations of the testimony of

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[4] TINS argues that the jury was "[f]ree to disbelieve the testimony of Armstrong's district manager that he limited his comments to the 'overlap' and it 'doesn't make a lot of sense' remarks." Opp. 9, n.4. But *Bose Corp.* v. *Consumers Union*, 466 U.S. 485, 512 (1984), holds that disbelief of testimony inconsistent with a material fact in a plaintiff's claim cannot satisfy the plaintiff's burden of proof on that fact. Moreover, "antitrust law limits the range of permissible inferences," *Matsushita*, 475 U.S. at 588, and under *Monsanto*, a jury is not free to disregard testimony and then make up its own version of assumed facts to support a vertical conspiracy charge. 465 U.S. at 764 ("there must be evidence that tends to exclude the possibility" of independent action).

[5] Opp. 3-4, 7-8. The parties stipulated in the Final Pretrial Order (JA733-34) that this dispute involved (1) Armstrong's allegation that in 1983 TINS "had interfered . . . with contracts or valid prospective business relationships between Armstrong and certain Armstrong wholesalers," and (2) TINS' allegation that in 1983 Armstrong had "interfere[d] with contracts or valid prospective business relationships between certain Armstrong wholesalers and the TINS Corporation." This 1983 dispute was resolved by a Settlement Agreement in January 1984. The district court concluded that in relation to the 1984 events at Stern, the 1983 evidence was both "remote in time" and detached by "significant intervening events." 143A n.20. This ruling was undisturbed on appeal.

[6] Opp. 8. The full text of this memo is in the Appendix to the Petition. 191A-192A. The district court held (141A-142A), as is evident on the face of the memo, that the memo cannot support any inference of wrongful conduct. This is another ruling left undisturbed on appeal.

TINS' President (Fineman);[7] or (iv) impermissible inferences that an act or event occurred on the theory that the jury may have "disbelieved" a witness's contrary testimony.[8]

Finally, TINS claims that the Third Circuit's conspiracy ruling was correct on the theory that "this is not a vertical case" and therefore "the logic of *Monsanto's* holding . . . is simply irrelevant" because of the "distinct horizontal flavor" of the alleged anticompetitive effects in this case. Opp. 13. But that theory "introduces needless confusion" and was therefore expressly rejected in *Business Electronics* v. *Sharp Electronics*, 485 U.S. 717, 730 & n.4 (1988) (a "restraint is horizontal not because it has horizontal effects, but because it is the product of a horizontal agreement," whereas

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TINS' assertion "that the reference to assistance meant that Armstrong would cut off critical promotions to distributors that signed up with TINS" (Opp. 8) was considered by the district court to be a "flagrant distortion of the evidence." 135A.

[7] TINS twice misstates Fineman's objectionable multi-level hearsay testimony regarding his telephone conversation with Abrahamson on June 23, 1984, the day after Stern canceled the Letter of Intent. Respondents attribute to Abrahamson the statement "that a principal reason for Stern's pulling out of TINS was leverage applied by Armstrong." Opp.4, 8. But in the cited hearsay testimony, Fineman said that Abrahamson told him that an unnamed Armstrong employee purportedly had said he would reject a request by an unnamed Stern employee who had allegedly said that Stern desired to use Armstrong's promotional funds "for TINS," *i.e.*, to promote the TINS magazine rather than an Armstrong product. JA 1907-09. In the court of appeals, TINS recognized in two of its briefs that such a statement by an unnamed Armstrong employee "hypothetically might have been legitimate." Appellants' Br. 32, Reply Br. 10. There is simply no reference in Fineman's testimony to any "principal reason" given by Abrahamson, or to any "leverage" by Armstrong.

[8] TINS characterizes as "suspicious" (Opp.9-10, n.4) the testimony of Roth and Abrahamson that they did not play golf on June 8, 1984, although Roth's desk calendar indicated that he had earlier reserved that date for such purpose. But whether or not they did play golf on June 8, "discredited testimony is not considered a sufficient basis for drawing a contrary conclusion," *Bose*, 466 U.S. at 512, and there is no evidence of anything said or done during any golf match.

"[r]estraints imposed . . . by agreement between firms at different levels of distribution [are treated] as vertical restraints" for purposes of "antitrust analysis").

2. **The Relevant Video Market Question.** TINS argues that the Petition is "wildly inaccurate" in saying that "the court of appeals applied a 'functional equivalency' test." Opp. 14. But that is precisely what the Third Circuit did, because the record included no facts to support a conclusion that the two different video products were in the same market based on the reasonable interchangeability test or the cross-elasticity of demand test under *United States* v. *E. I. duPont de Nemours & Co.*, 351 U.S. 377, 400, 404 (1956) ("*Cellophane*"). The cross-elasticity of demand test requires evidence showing that whenever there is a "slight" price increase for one of the two products in question, then "a considerable number of customers" capable of using both products will switch to the other product for which there is no price increase. *Id.* at 400. The Third Circuit did not even purport to apply this test because the record contains absolutely no evidence to satisfy the test.

Moreover, the words "reasonable interchangeability" do not appear at any point in the Third Circuit's market analysis. The fragments of evidence cited by TINS (Opp. 15) are conclusory and totally unresponsive to the legal test in *Cellophane* requiring "reasonable interchangeability for the purposes for which they are produced — price, use and qualities considered." *Id.* at 404.[9]

Nor can TINS support its argument that the Third Circuit made only an "offhand reference" (Opp. 15 n.7) when it cited

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[9] An illustrative example is the cited conclusory testimony of Fineman (Opp 15) that the two videos were in "the same market." But the evidentiary fact provided by Fineman was his "functionally equivalent" statement, which in effect TINS acknowledges to be insufficient for purposes of the legal requirement of reasonable interchangeability.

Fineman's "functionally equivalent" testimony. 55A. To the contrary, this was the *only* evidentiary fact cited by the Third Circuit that might satisfy a market definition test. Having the support of only Fineman's "functionally equivalent" testimony and facing a record with the testimony of TINS' National Sales Manager that substitution of Armstrong's videos for the TINS magazine "made no sense whatsoever," the most the Third Circuit was willing to say was that there could be an "inference" that retailers "may have perceived" the two videos to be "interchangeable." 56A. But the record contains no such retailer testimony, and speculation that functionally equivalent products "may be perceived" to be "interchangeable" cannot establish the "reasonable interchangeability" required by law.

It is crystal clear that the Third Circuit applied a "functionally equivalent" test and did not reach any conclusion that the two videos were "reasonably interchangeable."

3. **The Question on Injury to Competition and Related Antitrust Injury**. TINS argues that (1) "Armstrong did not *raise the issue [in this question] before the court of appeals*" (Opp. 16, emphasis in original), and (2) "[f]urthermore, the question presented has no merit." *Id.* To support the first proposition, TINS attached to its Brief the text of one part of Section VI of Armstrong's brief in the Third Circuit. But TINS failed to inform the Court that in another part of this same Section VI, Armstrong's brief argued:

> In any event, competition simply was not harmed. In a vertical case, the focus of legal inquiry is whether defendant's alleged practices improperly "foreclose competition in a substantial share of a line of commerce." *Pitchford* v. *Pepi*, 531 F.2d 92, 100 n.15 (3d Cir. 1976). TINS was allegedly "foreclosed" from access to only Stern, which served a tiny fraction of the alleged nationwide video magazine market, and TINS would

> continue to have available 2,198 other wholesalers reported by the Bureau of Census (A8563) or 449 other wholesalers based on Fineman's numbers. A1777. Even on Fineman's figures, lack of access to Stern denied TINS from only 1/4 of 1% of the available wholesalers and did *not* foreclose access to other wholesalers serving the Connecticut area or the nationwide market. This is clearly *de minimis* in its effect upon competition. *Tampa Elec. Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 330-34 (1961) (foreclosure of less than 1% does not violate antitrust laws).

Armstrong's Brief in the Third Circuit at 47. Section VI of this brief also included a subsection entitled "Neither TINS Nor Fineman Incurred Antitrust Injury."[10]

On the merits, TINS' position is not advanced by its argument that Armstrong "erroneously equates the [injury to competition] standards of § 1 and § 2 of the Sherman Act." Opp. 18, n.10. To the contrary, Armstrong simply relies on the *underlying evidentiary facts* cited by the Third Circuit for its conclusion that Armstrong had no exclusionary power sufficient to injure competition for purposes of Section 2, as well as the undisputed facts on the availability to TINS of hundreds or even thousands of other distributors in the stipulated nationwide market. Those undisputed facts show as a matter of law that there was no injury to competition or related antitrust injury for purposes of Section 1.

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[10] TINS' assertion that Armstrong did not raise these arguments below is only one of many incorrect statements in TINS' Brief in Opposition. Most of the incorrect statements (despite their strident tone) are irrelevant or peripheral, and in any event no useful purpose would be served by responding in kind.

CONCLUSION

For the reasons stated here and in the Petition, the Court should grant the writ and either summarily reverse the Third Circuit's vertical conspiracy ruling or, alternatively, hear the case on the three questions presented in the Petition.

Respectfully submitted,

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